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State Responsibility for the Administration of Federal Programs Under the Clean Air Amendments of 1970: a Statutory and Constitutional Analysis

Comments

STATE RESPONSIBILITY FOR THE ADMINISTRATION OF FEDERAL PROGRAMS UNDER THE CLEAN AIR AMENDMENTS OF 1970: A STATUTORY AND CONSTITUTIONAL ANALYSIS

I. INTRODUCTION

The federal government has traditionally assumed primary responsibility for enforcing federal commerce clause legislation.[1] Four recent court of appeals cases, however, involved an apparent deviation from this custom: federal authorities sought to delegate enforcement responsibility for commerce legislation to the states. The courts examined whether the Clean Air Amendments of 1970[2] authorized the EPA Administrator to compel states to adopt and enforce federal regulations as local law and, if so,

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1. Although the federal government has assumed responsibility for the implementation of its own commerce legislation, there have been numerous attempts to enlist state aid. The provision of federal funds has been conditioned upon state compliance with federal standards. *See, e.g.,* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). Occasionally, the federal government has openly solicited the states' voluntary participation in an enforcement program. The most typical approach to obtaining state cooperation, however, has been through the threat of direct federal enforcement or the promise of federal funds. *See* Maryland v. EPA, 530 F.2d 215, 228 (4th Cir. 1975). *See also* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 515–16 (1954).

2. 42 U.S.C. § 1857c-5 (1970).

The history of air pollution legislation abounds with references to both economic and social policies reflecting the propriety of cleaning the air under the ambit of the commerce clause. *See* STAFF OF SENATE COMM. ON PUBLIC WORKS, 88th Cong., 1st Sess., A STUDY OF POLLUTION — A STAFF REPORT TO THE COMMITTEE ON PUBLIC WORKS, UNITED STATES SENATE (Comm. Print 1963). Prior to the amendments, Congress had recognized the interstate effects of air pollution, noting its adverse economic effects on crops as well as its harmful effects on humans. *Id.* at v (preface by Senator Muskie), 14–15, 18. These observations produced legislation in 1963 and 1967. Act of Dec. 17, 1963, Pub. L. No. 88–206, 77 Stat. 392; Act of Nov. 21, 1967, Pub. L. No. 90–148, 81 Stat. 485. By 1970, the economic effects of air pollution were obvious. Consequently, comments on the adverse effects of pollution emphasized justifications for specific portions of the 1970 act. *See* H.R. REP. No. 1146, 91st Cong., 2d Sess. 3 (1970) (discussion of the potential economic advantages to states with lax standards for factory emissions); 116 CONG. REC. 42390 (1970) (letter of November, 1970 from HEW Secretary Elliott Richardson to Congress urging the retention of preemptive federal emission standards for new motor vehicles and noting the practical difficulties in the production and sale of motor vehicles if each state were free to establish standards more stringent than the federal minimum).

whether the commerce clause could support such legislation.[3] Subsequent to the four circuit court decisions, the Supreme Court decided *National League of Cities v. Usery*,[4] which restricted the scope of federal commerce legislation that unduly hampers the operation of state governments. This Comment will discuss whether the statutory scheme of the Clean Air Amendments allows the EPA to make such extraordinary demands upon the states. On the assumption that the statute can be so interpreted, this Comment will then consider whether such legislation is a proper exercise of the commerce power in light of the recent decision in *National League of Cities*.

II. STATUTORY ANALYSIS OF THE CLEAN AIR AMENDMENTS OF 1970

A. *The Statutory Structure*

By 1970, the pockets of air pollution enveloping major American cities had become a significant health hazard.[5] In an effort to improve air quality control Congress enacted the Clean Air Amendments. Although a portion of the amendments provided standards for the reduction of pollution from stationary sources,[6] the new emission standards were concerned mainly with the automobile, not the industrial plant.[7] The amendments set forth a tripartite scheme for the development of anti-pollution programs. Initially, the EPA Administrator would issue national air quality standards designed to reduce the level of atmospheric pollutants.[8] Each state was then expected to formulate an implementation plan to meet

3. The four cases were: Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *cert. granted*, 96 S. Ct. 2224 (1976); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 96 S. Ct. 2224 (1976); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 96 S. Ct. 2224 (1976); Pennsylvania v. EPA, 500 F.2d 246 (3d Cir. 1974). For a general discussion of these four cases and the 1970 amendments, see Comment, *The Federal Enforcement Provisions of the 1970 Amendments to the Clean Air Act: Statutory Scope and Constitutionality*, 1976 B.Y.U.L. REV. 189 [hereinafter cited as Comment, *Enforcement Provisions*].

4. 96 S. Ct. 2465 (1976).

5. *See, e.g., Hearings on S. 3229, S. 3466, and S. 3546 Before Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (1970). In November of 1969, a severe inversion in Chicago increased by three times the number of deaths normally attributable to tracheal bronchitis. *Id.* at 465.

6. 42 U.S.C. § 1857c-5. For a discussion of the relationship between stationary sources of pollution, which are nonmobile sources such as factories, and land use controls, see Note, *EPA Regulation of "Indirect Sources": A Skeptical View*, 12 HARV. J. LEGIS. 111, 119-22 (1974).

7. *See* S. REP. No. 1196, 91st Cong., 2d Sess. 2 (1970); H.R. REP. No. 1146, 91st Cong., 2d Sess. 6 (1970).

8. 42 U.S.C. § 1857c-4 (1970). National air quality standards have been issued for such pollutants as sulphur oxides, hydrocarbons and photochemical oxidants. *See, e.g.*, 40 C.F.R. pt. 50 (1974).

these standards.[9] The Administrator was to approve a state implementation plan if it conformed to certain minimum requirements.[10] Pursuant to these requirements, the plan was to include provisions for: meeting standards within three years;[11] establishing emission limitations and a monitoring system;[12] providing necessary assurances of adequate state personnel, funding and authority;[13] and providing for periodic inspection and testing of motor vehicles to ensure compliance.[14] If the Administrator determined that a state plan did not conform to these minimum requirements he was to promulgate a new plan for the state.[15]

The promulgation provision provides in part:

> The Administrator shall . . . promptly prepare and publish . . . an implementation plan, or portion thereof, for a State if . . . the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section . . . .[16]

When the Administrator promulgated a plan it would then become the applicable implementation plan for the state.[17] An applicable implementation plan operates against all "persons," a term defined to include states as well as individuals and corporations.[18]

The enforcement provision empowers the Administrator to seek sanctions for single violations.

> Whenever . . . any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies . . . . [After 30 days] the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action . . . .[19]

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9. 42 U.S.C. § 1857c-5(c). Examples of transportation controls within such implementation plans would include parking restrictions, exclusive bus lanes, gasoline sales limitations and state inspection programs. *See* 40 C.F.R. § 51.1(r) (1973).

10. 42 U.S.C. § 1857c-5(a)(2) (1970).

11. 42 U.S.C. § 1857c-5(a)(2)(A) (1970).

12. 42 U.S.C. § 1857c-5(a)(2)(C) (1970).

13. 42 U.S.C. § 1857c-5(a)(2)(F) (1970).

14. 42 U.S.C. § 1857c-5(a)(2)(G) (1970).

15. 42 U.S.C. § 1857c-5(c) (1970).

16. 42 U.S.C. § 1857c-5(c) (1970). This provision of the 1970 amendments significantly revises the promulgatory power of federal authorities. The 1967 Air Quality Act limited federal promulgations to the issuance of air quality standards and made no reference to state implementation plans. Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c)(1)-(2), 81 Stat. 492. This change in the language of the amendments clearly demonstrates the desire of Congress to guarantee that each state have an operating implementation plan.

17. 42 U.S.C. § 1857c-5(d) (1970).

18. 42 U.S.C. § 1857h(e) (1970).

19. 42 U.S.C. § 1857c-8(a)(1) (1970).

In the event of widespread violations, the same section provides for federal assumption of enforcement responsibility.

> Whenever . . . [these] violations of an applicable implementation plan . . . appear to result from a failure of the State in which the plan applies to enforce the plan effectively, [the Administrator] shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person . . . .[20]

The statutory scheme thus relies on federal authority to ensure that the clean air objectives are realized. If a state fails to adopt an effective plan or neglects to enforce an applicable implementation plan, the statute empowers the Administrator to cure the resultant deficiencies. Because states are considered persons under the enforcement provisions of the Act, the Administrator can control emissions from state vehicles. The Act fails, however, to specify whether the status of states as persons also allows the Administrator to remedy deficiencies by regulating states as governmental entities. This question of the capacity in which states might be regulated became the primary issue in the litigation over the content and validity of the EPA regulations. The Administrator contended that states might be regulated as persons regardless of the nature of the state function. In contrast, the states urged that they might be regulated as persons only when their actions parallel the conduct of individuals and corporations.

B. *The Genesis of the Litigation: The Promulgation of Plans for Pennsylvania, The National Capital Region, California and Maryland*

Following the issuance of national air quality standards in 1971,[21] the states were expected to develop implementation plans. The Administrator rejected portions of the plans submitted by Pennsylvania,[22] Cali-

20. 42 U.S.C. § 1857c-8(a)(2) (1970). Both the single and widespread violations sections of the enforcement provision demonstrate a marked departure from enforcement procedures under the Air Quality Act of 1967. Under the 1967 legislation, federal authorities could bring actions for the abatement of pollution in a single state. But federal enforcement action was conditioned on the consent of the governor of that state. Act of Nov. 21, 1967, Pub. L. No. 90-148, § 108(c)(4), 81 Stat. 493.

21. 36 Fed. Reg. 8186 (1971).

22. The Administrator found Pennsylvania's plan deficient in several respects. It failed to provide for the reduction of nitrogen oxides and for proper air quality surveillance. 40 C.F.R. §§ 52.2027, 52.2029 (1973). Further, it failed to guarantee the purchase of necessary emission recording equipment and the availability of manpower and resources. 40 C.F.R. §§ 52.2030, 52.2031 (1973). Nor did the plan provide for the interstate dissemination of information concerning various levels of pollution in Pennsylvania. 40 C.F.R. § 52.2032 (1973).

fornia,[23] Maryland,[24] and the National Capital Region,[25] but refused to promulgate plans for these areas.[26] He deferred action in California until national air quality standards could be met,[27] and granted Pennsylvania, Maryland and the National Capital Region a two year grace period in which to meet the air quality standards.[28] But a court ruling in 1973 held that such extensions were impermissible under the terms of the Clean Air Act and ordered the Administrator to proceed immediately with the evaluation of the plans submitted by the states.[29] These plans

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23. The Administrator objected to California's submitted plan because it failed to list local agency resources for air pollution control, 40 C.F.R. § 52.235 (1973), and made no effort to ensure California's conformity with national air quality standards. 40 C.F.R. § 52.22(a) (1973). The Administrator noted in particular that California's Emergency Services Act did not provide for air pollution emergencies. 40 C.F.R. § 52.225 (1973).

24. Maryland's proposed plan was criticized because: it contained no guarantee that the state legislature would enact federal promulgations, 40 C.F.R. § 52.1074 (1973); it failed to use existing technology to solve the problem of nitrogen emissions in the Baltimore area, 40 C.F.R. § 52.1075 (1973); it did not provide for stationary pollution source testing in the Baltimore area, 40 C.F.R. § 52.1077 (1973); it failed to use emissions data efficiently in Baltimore, 40 C.F.R. § 52.1081 (1973); and its listing of Maryland's present and projected resources was inadequate, 40 C.F.R. § 52.1083 (1973).

25. The National Capital Region is composed of the District of Columbia; Montgomery and Prince George's Counties in Maryland; Arlington, Fairfax, Loudon and Prince William Counties in Virginia. The Administrator objected to the National Capital Region plan because the District of Columbia and surrounding communities failed to guarantee that their legislative bodies would make the necessary commitments to the execution of the implementation plans. 38 Fed. Reg. 16556–57 (D.C.), 16558–59 (Md.), 16563 (Va.) (1973).

26. The Administrator required the states to draft and submit their plans again by February 15, 1973. 37 Fed. Reg. 10891 (1972) (Pa.); 37 Fed. Reg. 10855 (1972) (Cal.); 37 Fed. Reg. 10871 (1972) (Baltimore); 37 Fed. Reg. 10858 (1972) (District of Columbia proper); 37 Fed. Reg. 10871 (1972) (Prince George's and Montgomery Counties in the District region).

27. A federal district court ordered the Administrator to promulgate regulations setting forth an implementation plan for the control of photochemical oxidants in California. Riverside v. Ruckelshaus, 4 E.R.C. 1728, 1731 (C.D. Cal. 1972). The Administrator determined that an 87% reduction in vehicle miles travelled would be necessary in order to attain an acceptable photochemical oxidant level. This required a two year extension of the deadline for meeting photochemical and carbon monoxide standards. California was given until 1977 to meet this deadline. 38 Fed. Reg. 2194–95 (1973).

28. 37 Fed. Reg. 10889 (1972) (Pennsylvania given until 1977 to attain photochemical and carbon monoxide standards); 37 Fed. Reg. 10871 (1972) (Baltimore given until 1977 to attain photochemical and carbon monoxide standards); 37 Fed. Reg. 10871 (1972) (Prince George's and Montgomery Counties given until 1977 for the attainment of photochemical and carbon monoxide standards).

29. Natural Resources Defense Council, Inc. v. EPA, 475 F.2d 968 (D.C. Cir. 1973) (per curiam). The Administrator promptly responded to the decision. 37 Fed. Reg. 10889 (1972), *as amended* 40 C.F.R. § 52.2022 (1973) (1977 extension for Pennsylvania withdrawn); 37 Fed. Reg. 10851 (1972), *as amended* 40 C.F.R. §§ 52.222, 52.237 (1973) (1977 extension withdrawn for California); 37 Fed. Reg. 10871 (1972),

were found to be deficient because they failed to satisfy the minimum requirements prescribed by that statute.[30] Accordingly, the Administrator promulgated transportation control plans[31] for the four regions. Although the states accepted parts of these plans, they vigorously rejected others.[32] In order to understand the intensity of the states' reaction, knowledge of the content of some of the contested portions is necessary.

Each state objected to provisions requiring it to establish and enforce retrofit or auto inspection programs or both.[33] In order to ensure the realization of these objectives, the provisions instructed the states to supply a compliance schedule for each program; to provide the Administrator with the text of any necessary enabling regulations or statutes; to offer assurances that funding would be available, including the text of any funding legislation; and to guarantee that the programs would be in operation by a specified date.[34] A related provision directed the states to stop registering private vehicles that failed to comply with federal standards.[35] Other contested provisions were unique to individual plans. For example, parts of the National Capital Region plan[36] ordered the local authorities

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as amended 40 C.F.R. § 52.1072 (1973) (1977 extension for Baltimore withdrawn); 37 Fed. Reg. 10871 (1972), *as amended* 40 C.F.R. § 52.1072 (1973) (1977 extension for Prince George's and Montgomery Counties withdrawn).

30. For a discussion of the defects in the original state plans, see notes 22 to 25 *supra.*

31. The courts used the term transportation control plan to denote the applicable implementation plan for a particular region.

32. For a discussion of the particular issues involved in each state, see the discussion of the circuit court cases in notes 46 to 72 and accompanying text *infra.*

33. The following regulations ordered the institution of retrofit programs. Pennsylvania: 40 C.F.R. § 52.2039 (1974). National Capital Region: 40 C.F.R. §§ 52.492–.496 (D.C.), 52.1091–.1094 (Md.), 52.2444–.2447 (Va.) (1974). California: 40 C.F.R. §§ 52.244–.245 (1974). Maryland: 40 C.F.R. §§ 52.1096–.1100 (1974). A retrofit device ensures the injection of additional air into an internal combustion engine, causing a more complete use of fuel and a reduction of hydrocarbon emissions.

The following regulations ordered the institution of inspection programs. National Capital Region: 40 C.F.R. § 52.490 (D.C.), § 52.1089 (Md.), § 52.2441 (Va.) (1973). California: 40 C.F.R. § 52.242(d) (1974). Maryland: 40 C.F.R. § 52.1095(c) (1974).

34. *See* Maryland v. EPA, 530 F.2d 215, 224 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827, 830 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 979–80 (D.C. Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246, 249 (3d Cir. 1974).

35. This provision was included in the regulations ordering operation of inspection programs. The regulations are listed in note 29 *supra.*

36. Several collateral promulgations were no longer at issue at the time of the court of appeals decision. Shortly before the decision the Administrator had revoked promulgations concerning inspection and retrofit programs for light-duty fleet vehicles. Earlier, the Administrator had withdrawn provisions imposing a surcharge on commuter parking. 39 Fed. Reg. 1848 (Jan. 15, 1974). Similarly, the Administrator had deferred rulemaking on vapor recovery devices. 40 Fed. Reg. 1126–27 (1975). Finally, the Administrator had suspended parking management regulations. 40 Fed. Reg. 2585–86 (Jan. 14, 1975).

to purchase an additional 475 buses by 1977[37] and to construct exclusive express bus lanes and exclusive bikeways in accordance with EPA blueprints.[38] Portions of the California plan ordered the state to establish a computerized car pool matching system[39] and to identify preferential bus and car pool lanes on existing roads.[40] Many of these provisions imposed detailed reporting requirements that would enable the EPA to monitor state compliance.

These plans exhibit a common design: through them the EPA sought to thrust upon the states the responsibility for formulating and enforcing programs to meet the clean air standards. In his general preamble to the transportation control plans, the Administrator articulated the philosophy underlying this approach.

> Direct Federal enforcement and massive, duplicative Federal programs aimed at vehicles on an individual basis were not the means contemplated by the Act to solve these problems. It is clearly necessary that implementation of transportation control plans be carried out at the State and local level.[41]

The Administrator attempted to ensure the success of this approach by incorporating the commands of the minimum requirements provision into the implementation plan promulgated for each state; a failure to comply with these requirements would constitute a violation of the plan[42] thereby subjecting the state to the sanctions of the enforcement provision.[43] In this way the promulgation and enforcement provisions could be used to compel a state to adopt measures to implement the plan if it failed to do so voluntarily. Under this approach, the Administrator could prescribe

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37. 40 C.F.R. §§ 52.476(g) (D.C.), 52.1080(g) (Md.), 52.2435(e) (1974) (Va.).

38. The regulations requiring the construction of bus lanes can be found at: 40 C.F.R. §§ 52.476(h) (D.C.), 52.1080(h) (Md.), 52.2435(f) (1974) (Va.). The bikeway regulations can be found at: 40 C.F.R. §§ 52.491 (D.C.), 52.1091 (Md.), 52.2552 (Va.).

39. 40 C.F.R. § 52.257(c) (1974).

40. 40 C.F.R. §§ 52.258(f), 52.259(f) (1974).

41. 38 Fed. Reg. 30,633 (1973).

42. The Administrator issued the promulgations in connection with a regulation that stated in part:

> Failure to comply with any provisions of this part shall render the . . . Governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under Section 113 of the Clean Air Act [A] . . . Governmental entity will be considered to have failed to comply with the requirements of this part . . . if the compliance schedule when

40 C.F.R. § 52.23 (1974).

43. The Administrator subsequently contended in *Brown* that the available sanctions included "injunctive relief, imposing a receivership on certain state functions, holding a state official in civil contempt with a substantial daily fine until compliance is secured, and requiring a state to allocate funds from one portion of its budget to another in order to finance the undertakings required by the Agency." Brown v. EPA, 521 F.2d 827, 831 (9th Cir. 1975).

the content of state legislation, direct the expenditure of state funds to implement programs, and seek sanctions against a state that resisted.

The states contested the Administrator's view of his authority under the amendments. They argued that if his interpretation were correct, the direct interference with state governmental processes would violate the constitutional guarantee of a republican form of government and transgress the principles of federalism.[44] The states insisted that Congress intended state participation in the formulation and administration of clean air programs to be strictly voluntary.[45] The promulgation and multiple violation provisions, according to the states, made federal action a complete substitute for state action. In brief, the position of the states was that they could not be forced to serve as agents of the federal government.

Of the four circuits, the Third Circuit, in *Pennsylvania v. EPA*,[46] adopted the most liberal interpretation of the Administrator's authority. The issue before the court was whether a transportation control plan promulgated by the Administrator might contain a provision requiring Pennsylvania to enact and enforce a retrofit program.[47] In dealing with this issue, the court considered the legislative history of the amendments. Because the purpose of the amendments was the improvement of air quality through the programs embodied in the minimum requirements, it was clear that Congress had contemplated the implementation of those programs. The unresolved question was whether federal or state authorities would bear the ultimate responsibility for implementation. Given the opposition to federal implementation expressed in the congressional commentary on the amendments, the Third Circuit decided to defer to the Administrator's determinations that federal implementation was not feasible and that the burden of enforcement was properly placed on the states.[48]

The court then noted that the minimum requirements directed the states to provide in their implementation plans for the institution of auto inspection programs. From its reading of the legislative history, the court inferred that Congress must have therefore intended this inspection requirement to be enforceable against the states. Since a federal plan might

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44. The states sought review of the regulations pursuant to section 1857h-5(b)(1), which grants a right of review in the court of appeals.

45. Brown v. EPA, 521 F.2d 827, 838 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971, 981 (D.C. Cir. 1975).

46. 500 F.2d 246 (3d Cir. 1974).

47. Pennsylvania argued that the retrofit program was neither practicable, well considered or timely given the latest testing techniques. But the court noted that under proper testing conditions, the retrofit program produced a satisfactory reduction of automobile emissions. The program had been analyzed on a cost effectiveness basis. *Id.* at 251-52.

48. *Id.* at 257-58. The court stated: "The legislative history of the Clean Air Amendments of 1970, far from demonstrating such a prohibition, shows a clear expectation that the states would have to implement significant portions of their transportation control plans and indicates an underlying assumption that they could be required to do so." *Id.* at 258.

direct the states to institute auto inspection programs, one of the minimum requirements, it was thought unlikely that Congress would have objected to the imposition of the similar program of retrofit installation, even though it was not one of the minimum requirements.[49] Thus, according to the court, a federal implementation plan might require a state to establish a retrofit program according to federal specifications.

The transportation control plan at issue in *District of Columbia v. Train*[50] was more complicated than the Pennsylvania plan; it involved the establishment of an inspection program, construction of express bus lanes, purchase of buses, and the institution of a retrofit program. The District of Columbia Court of Appeals focused on the power of the Administrator under the promulgation and enforcement provisions. Although recognizing that the Administrator has the authority to regulate a state whose activities constitute a direct or indirect source of pollution, the court could not find any statutory language authorizing the Administrator to compel a state to enact the statutes and regulations necessary to fill in the details of the federal implementation plans.[51] The court ruled that rejection of a state plan obligated the Administrator to promulgate immediately a complete and effective implementation plan to serve in its place;[52] he could not delegate this responsibility to the states. Concluding that this was the logical and obvious design of the statutory structure, the court noted that had Congress intended to adopt the novel approach advocated by the Administrator, it would have made that intent clear in the statute.[53] The language of the enforcement provision further supported the court's view of the meaning of the statute. The single violation section required that a separate notice of violation be provided to both the violator and the state. This procedure would introduce the awkward element of double notice if a state's failure to adopt an implementation plan constituted a violation.[54] Moreover, the widespread violations section provided that where the violations result from the failure of the state to enforce the plan, a period of

49. *Id.* at 258.

50. 521 F.2d 971 (D.C. Cir. 1975).

51. 521 F.2d at 984, 986.

52. *Id.*

53. *Id.* at 984. This position reflects a canon of statutory interpretation known as the policy of clear statement. Application of the canon means that a court will not attribute to a legislature an intention to adopt a radically different policy or procedure unless such an intent is clearly expressed. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1240–41, 1412–13 (tent. ed. 1958) [hereinafter cited as HART & SACKS]; notes 113 to 116 and accompanying text *infra*. *Accord* Maryland v. EPA, 530 F.2d 215, 228 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827, 834, 839 (9th Cir. 1975).

54. 521 F.2d at 985. One notice would identify the state as a violator, the truant enforcer or legislator of the administrator's promulgated plan. The second "neutral" notice to the state pollution agency would permit it to accumulate notices of federal enforcement actions for administrative purposes. For a further explanation of the double notice problem in the amendments, see note 90 *infra*.

federally assumed enforcement would follow. This language implied that inadequate state enforcement was not itself a violation.[55] Thus the Administrator's attempt to direct the conduct of state legislatures by treating noncompliance as a violation was unwarranted. Accordingly, the court vacated those portions of the federal regulations that ordered the states to enact statutes and regulations and to take other actions necessary to complete the regulatory scheme.[56]

The court indicated, however, that other portions of the federal plan which did not require action by state legislatures might still be valid. It suggested that regulations requiring the adoption of laws by a state were distinguishable from those seeking only to obtain state enforcement of federal plans.

> In other words, even though the states may not be compelled to enact statutes to fill in the details of the Administrator's regulations, it may be argued that they can be ordered to take actions which implement the federally imposed regulations.[57]

Although the statute did not expressly make this distinction, the court observed that such a distinction would preserve the autonomy of state legislatures yet avoid the creation of a new federal bureaucracy. This element, as well as the strident expressions of opposition to federal enforcement found in the congressional commentary, led the court to conclude that the states might be compelled to administer an EPA program.[58] Furthermore, the court affirmed those portions of the plan requiring the purchase of additional buses and the construction of exclusive bus lanes. It identified state transportation and highway construction policies as indirect sources of pollution that could be regulated in the same manner as direct pollution from state vehicles.[59]

In *Brown v. EPA*,[60] the Ninth Circuit described the federally promulgated plan as an attempt to "reduce the states to puppets of a ventriloquist Congress."[61] In light of the awesome consequences for federalism that would result from state legislators being forced to undertake the Administrator's errands, the court refused to resolve the ambiguities of the statute in favor of the Administrator. Accordingly, the federal regulations, which required California to establish inspection and retrofit programs and to alter state transportation policies relating to buses, car pools, traffic

55. 521 F.2d at 986–87.

56. *Id.*

57. *Id.* at 987. For example, a state could not be compelled to enact the legislation necessary to establish an inspection program, but it could be required to deny registration to motorists who failed to comply with federal law.

58. *Id.* at 987–88, 995.

59. *Id.* at 989–90.

60. 521 F.2d 827 (9th Cir. 1975). Two companion cases, Arizona v. EPA, 52' F.2d 825 (9th Cir. 1975) and Alaska v. EPA, 521 F.2d 842 (9th Cir. 1975), were resolved on identical grounds.

61. 521 F.2d at 839.

patterns, and mass transit planning were held to be unenforceable.[62] Although the Ninth Circuit acknowledged that states could be regulated as polluters, it determined that the general structure of the amendments failed to indicate any congressional intention to punish a state that failed to reorganize its transit system or regulate third persons.[63] With respect to the single violation section, the court distinguished between violations by a state acting in its governmental capacity and violations by a state acting in a private capacity; it also noted the double notice problem caused by classifying recalcitrant state legislatures and executives as violators.[64] The distinction between states and violators also influenced the Ninth Circuit's interpretation of the widespread violations section. The court maintained that if Congress had intended to compel the states to enact legislation and supply enforcement, it would have specifically subjected states, as persons, to the "period of federally assumed enforcement."[65] In the absence of language to that effect, federal promulgations could not be used to delegate enforcement responsibilities to a state during the "period of federally assumed enforcement" which arose from the discovery of widespread violations.

The Ninth Circuit recognized the ambiguities as to the Administrator's proper function under the promulgation and enforcement provisions and acknowledged that the statute and legislative history could be interpreted to support the Administrator's position. Nonetheless, the court indicated that the language and structure of the Act sufficiently refuted the Administrator's theory of state subservience. In addition, it suggested that fundamental principles of federalism, which provide for the preservation of state control over its own governmental processes, invalidated the Administrator's position. The court was also troubled by the possibility that the approach urged by the EPA could sever the taxation power on the state level.[66] These apprehensions about the "ability of states 'to function

62. *Id.* at 831.

63. *See id.* at 832–36. The Ninth Circuit observed that the congressional debates revealed divergent viewpoints on the extent of federal enforcement intended under § 1857c–8. On the floor of the House, one congressman stated that:

> [i]f a State hangs back and fails to move out, the Federal Government will take over and make rules and regulations amounting to a State plan. Machinery for forcing a plan upon a State is spelled out including penalties of $10,000 a day for failing to act.

521 F.2d at 836, *quoting* 116 CONG. REC. 19206 (1970) (remarks of Congressman Springer). Another congressman, referring to the same provision in the House draft of § 1857c–8, clearly implied that the provision penalized only polluters. *Id. quoting* 116 CONG. REC. 19218 (1970) (remarks of Congressman Vanik). The Ninth Circuit also referred to ambiguities in the committee reports. For example, the Senate report emphasized that upon failure of the state to enforce federal guidelines against polluters, "[the Administrator] would be expected to use the full force of Federal law." *Id.* at 835, *quoting from* S. REP. No. 1196, 91st Cong., 2d Sess. 20 (1970).

64. *See* 521 F.2d at 833–35.

65. *See id.* at 834.

66. *Id.* at 840.

effectively in a federal system' under the Administrator's interpretation"[67] led the court to resolve the ambiguities in favor of California.

The Fourth Circuit, in *Maryland v. EPA*,[68] described the federal promulgations that sought to transform state legislatures into auxiliary departments of the EPA as "astonishing."[69] Although the constitutional implications of the Administrator's action troubled the court, it refrained from ruling on the constitutional validity of the regulations.[70] Instead, it resolved the issue through statutory interpretation. The Fourth Circuit found no specific language in the promulgation provision authorizing the Administrator to direct a state to enact statutes and regulations to implement the plan he prescribed.[71] Rather, it found that responsibility for developing such regulations rested with the EPA. Moreover, the court noted, the structure of the Act did not evidence any intention on the part of Congress to abandon the customary approach of securing state cooperation through the use of threat and promise.[72]

The four circuit court opinions present three major problems in interpreting the statutory scheme of the Clean Air Amendments of 1970. The first problem relates to whether the promulgation provision allows the Administrator to delegate to the states the responsibility for developing the standards and programs that are to comprise the implementation plan. Second, there is the question whether the federal promulgation may direct a state to administer and enforce the programs contained in a plan. Finally, it is not clear whether the Administrator may seek sanctions under the enforcement provision against a state that refuses to follow the directions of a federal promulgation. This last problem relates obviously to the other two — if the adoption and enforcement provisions do not bind the states, their inclusion in a federal plan is meaningless.

The four courts reached different conclusions on these issues. The Third Circuit did not distinguish between regulations requiring adoption by a state legislature and those ordering enforcement by a state. It simply held that Pennsylvania might be compelled to establish a retrofit program,[73] and that sanctions would be available if the state refused to comply. The District of Columbia Circuit determined that the states might not be required to adopt the regulations and statutes necessary for a comprehensive implementation plan but the states might be required to administer the programs of an EPA plan.[74] It also found that federal regulations might control state activities that constitute indirect sources of pollution, such as the building and maintenance of state highways. The opinions

67. *Id.* at 842.
68. 530 F.2d 215 (4th Cir. 1975).
69. *Id.* at 224.
70. *Id.* at 226–27.
71. *Id.* at 227.
72. *Id.* at 228.
73. *See* notes 46 to 49 and accompanying text *supra.*
74. *See* notes 50 to 59 and accompanying text *supra.*

of the Fourth and Ninth Circuits evinced agreement with the District of Columbia Circuit's conclusion that the statute did not authorize the Administrator to control the state legislative process.[75] But they did not accept the District of Columbia Circuit's distinction between regulations requiring state enforcement and those requiring state legislation. According to their view of the statute, state participation in the implementation of EPA plans was to be voluntary.

C. *Interpretation of the Statute*

Each of the four circuit courts was confronted with the problem of interpreting a complex and ambiguous statute. Although three of the four courts agreed that the powers asserted by most of the contested regulations exceeded the Administrator's authority, these courts applied different considerations in reaching this conclusion. Admittedly, no system for analyzing and resolving ambiguities in statutes has been precisely formulated or universally adopted.[76] Nonetheless, there would seem to be certain elements that should be considered in the process of interpreting a statute. This section will identify these elements and apply them to the Clean Air Amendments of 1970.

Analysis of a statute should begin with the identification of the ambiguities to be resolved. The 1970 Clean Air Amendments contain several types of ambiguities. One type of ambiguity arises from the language of the statute: for instance the meaning of "for" in the part of the promulgation provision authorizing the Administrator to "prepare . . . an implementation plan . . . for a State" is unclear. The Administrator contended that regulations directing the states to supply all the details of an implementation plan satisfied this statutory command.[77] In contrast, the states insisted that this use of "for" required the Administrator to develop a fully operative implementation plan.[78] There was a similar disagreement over whether a "violation" of the enforcement provision included a state's refusal to comply with the provisions of an implementation plan involving adoption of state legislation or state administration of an EPA program.

The structure of the statute creates another type of ambiguity. The statute does not explain the relationship between the minimum requirements and the promulgation provisions; there is no description of the proper content of a federal implementation plan or the respective roles of state and federal authorities with regard to the formulation and administration of the plan.

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75. *See* notes 60 to 72 and accompanying text *supra.*

76. *See* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 529–35 (1947); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 VAND. L. REV. 395 (1950).

77. *See* notes 41 to 43 and accompanying text *supra.*

78. *See* notes 44 to 45 and accompanying text *supra.*

There would seem to be three levels of interpretation on which a court could operate in resolving the ambiguities presented by this statute. First, the court could simply accept the EPA's interpretation. Second, it could attempt to resolve the ambiguities through scrutiny of the language and structure of the statute. Finally, it could consider other relevant sources such as legislative histories, legislative purpose, or basic legal principles.

Operating on the first level, a court would adopt the interpretation of the statute expressed in the Administrator's regulation.[79] The result here would be that the Administrator might require the states to formulate and administer implementation plans and treat noncompliance as a violation for which sanctions would be available. There is some authority for judicial deference to an administrative agency's interpretation of a statute, but although the Third Circuit adopted this approach the considerations that justify deference in some instances are not present here.[80] The policy of deference to administrative interpretation developed in response to those situations involving agency expertise or internal policy where the impact of judicial acceptance of the agency's position was limited.[81] In contrast, adoption of the Administrator's interpretation of the Clean Air Amendments would significantly affect relations between the federal and state governments. Because adoption of the interpretation offered by the EPA would mark a startling deviation from the prior congressional approach to implementing commerce legislation and would raise significant constitutional issues, independent judicial interpretation of the statute is appropriate.[82]

The second level of interpretation entails scrutinizing the language and structure of the statute to ascertain its meaning. Professor Dickerson has characterized this analysis as the cognitive aspect of interpreting

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79. *See* text of regulation in note 42 *supra*.

80. The Third Circuit expressed the view that the interpretation of the EPA was entitled to great deference, particularly since the statutory provisions were new and had not been applied. Pennsylvania v. EPA, 500 F.2d 246, 257 (3d Cir. 1974). None of the other circuits accepted this view.

81. The case relied upon by the Third Circuit to justify deference can be distinguished on this basis. Udall v. Tallman, 380 U.S. 1 (1965), involved a dispute over the Department of Interior's interpretation of one of its regulations, which restricted the use of certain federal lands. Since the controversy centered on an administrative regulation rather than a statute, deference was particularly appropriate. *Id.* at 16.

82. In NLRB v. Brown, 380 U.S. 278 (1965), the Court stressed the importance of independent judicial evaluation of administrative decisions.

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

Id. at 291–92.

statutes.[83] By describing the process as cognitive, he seeks to depict the focus of the courts' scrutiny as a process of discovering the meaning of the words used in the statute.[84] This process entails an investigation of the words and the statutory context in which the words are used. To the extent that such an investigation can resolve the questions before a court, there is no need for recourse to more problematic indices of legislative meaning.[85]

Unfortunately, a cognitive investigation of the Clean Air Amendments of 1970 cannot resolve the controversy between the EPA and the states. The ambiguities in the promulgation and enforcement provisions that engendered the dispute cannot be eliminated solely by reference to the statutory language and its context. Nevertheless, a close reading of the statute lends some support to the states' contention that compulsion of state legislatures was not intended.

The promulgation provision, section 1857c–5(a), states that in the event a state plan proves inadequate, the Administrator is to prepare an implementation plan for the state. According to section 1857c–5(d), a promulgated plan, or its most recent revision, becomes the applicable implementation plan for the state. Under the enforcement provision, section 1857c–8, a violation of any requirement of an applicable implementation plan allows the Administrator to seek sanctions against the violator. Since a promulgated plan immediately becomes binding, the implication is that the plan should be complete when issued. The EPA regulations that seek to delegate the responsibility for formulating the details of an implementation plan to the states would therefore conflict with the apparent design of the statute. Such a reading would correspond with the District

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83. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 217–37 (1975).

84. With respect to the cognitive function, Dickerson observes:

> Because communications are often imperfectly framed or inadequately transmitted, a corresponding part of the message is lost unless the reader, by logical induction and deduction, makes a compensating effort to search the relevant and sometimes competing elements to find the most plausible basis for a reliable, though more attenuated, inference of intended meaning. This often takes some doing, especially with complex communications such as statutes.
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> [T]he court has a responsibility to resolve the controversy that it may not evade. Because this responsibility requires deference to the legislature, the court is justified in initiating its own solution only if a legally adequate answer cannot be found, through the normal processes of cognition, within the statute and its proper context.

R. DICKERSON, *supra* note 83, at 22 (footnotes omitted). The process of cognition requires objectivity and a sensitivity to usage, as well as a recognition of the various tacit assumptions that affect meaning. *Id.* at 236–37.

85. *See supra* note 83, at 22.

of Columbia Circuit's conclusion that the EPA must promulgate a comprehensive plan, rather than place the burden of doing so on the states.[86]

The language of the widespread violations section of the enforcement provision appears to support the states' argument that the refusal to enforce a federal plan does not constitute an actionable violation. The provision authorizes a period of federally assumed enforcement to begin when it appears that widespread violations have resulted from the failure of the state to enforce the plan.[87] This language apparently implies that a state's failure to enforce a plan, although perhaps an inducement to violations, is not a violation itself.[88]

Finally, there is the problem of double notice under both the single and widespread violations sections of the amendments. If the recalcitrance of a state constitutes a violation, both sections would seem to require the delivery of two separate notices to a state, one addressing the state as a violator, the other as a governmental entity. The District of Columbia Circuit considered this procedure to be so inherently inefficient that its design could not be reasonably attributed to Congress.[89] This problem can be avoided, of course, if states, acting as governmental entities, are not considered violators.[90]

But textual analysis of this sort cannot conclusively answer the substantive questions of statutory interpretation raised by the Clean Air Amendments, for each inference can be reasonably rejected. That a promulgated plan becomes operative immediately does not necessarily mean that it must be comprehensive and complete. Nothing in the statute requires that a plan be immediately effective against every person; instead the initial impact may be limited to "persons" who are states. In that

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86. 521 F.2d at 986. *Accord,* Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975).

87. 42 U.S.C. § 1857c-8 (1970).

88. *See* District of Columbia v. Train, 521 F.2d 971, 985-86 (D.C. Cir. 1975).

89. *Id.* at 985, 986.

90. Language in provisions other than section 1857c-8(a)(1)-(2) seems to present the same problem of unnecessary notice to a state. As a "person" under section 1857h(e), a state may have the capacity to sue the Administrator as a citizen plaintiff under section 1857h-2(b). Section 1857h-2(b) requires that a plaintiff citizen give notice to the state of his action against the administrator. The notion of a state, as plaintiff, giving notice to itself is anomalous. This anomaly may be avoided, however, by noting that under section 1857h-2(b) the plaintiff must also notify the federal government. Distinct and separate parties may be the recipients of the notice, the federal government and the state. Thus, even when a state is a plaintiff, the notice requirement retains some meaning for the federal authorities. *See* Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970,* 14 B.C. IND. & COMM. L. REV. 637, 663-64 (1973).

By contrast, section 1857c-8(a)(1)-(2) does not identify two separate recicipents of notice from the federal government. If a state were a violator, no other party but the state would exist to receive the notice. In short, unlike section 1857h-2(b), section 1857c-8(a)(1)-(2) provides no escape from the dilemma of double notice to the same party.

event, the only actionable violation would be the state's failure to adopt legislation or enforce federal programs. Although the language of the widespread violations section clearly indicates that a state's failure to enforce an implementation plan does not subject it to the liabilities of the section, that language does not indicate whether the single violation section applies to recalcitrant state governments. The refusal to supply the governmental cooperation requested by a federal implementation plan can be considered a single violation by a single party. Analysis of the double notice problem is similarly inconclusive. Every court recognized that the statute covered improper emissions by state vehicles, yet that type of state violation also necessitates the delivery of two separate notices to the state governments. Since the anomaly of double notice is presented by state violations that are clearly punishable under the Act, it is disingenuous to ascribe to Congress an intention to avoid this duplication of effort.

The third level of interpretation requires consideration of relevant materials other than the statute itself. The source of external material to which courts most commonly refer is legislative history. Reliance on this device has been criticized because of uncertainty about its reliability and relevance.[91] Nevertheless, legislative history if used cautiously can be a useful tool in interpreting a statute that cannot be fully understood through textual analysis. According to Professor Dickerson, the consideration of legislative history relates to the creative function of statutory interpretation.[92] He suggests that if the cognitive analysis of a statute fails to resolve the controversy, a court must formulate its own explanation of the statute's proper operation. This formulation can involve contemplation of the legislative intent in enacting the particular statute or a consideration of more general objectives and principles. To the extent that legislative history illuminates these elements, its use is proper.[93] The statutory history of the 1970 Clean Air Amendments that relates to the consequences of

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91. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–97 (1951) (Jackson, J., concurring); R. DICKERSON, *supra* note 83, at 162–64.

92. In describing the creative function, Professor Dickerson has noted that:

> We may conclude also that, whenever a court can say only "We cannot be reasonably sure which, if any, of a wide range of compatible readings was probably the intended one," or "What we perceive to be the meaning of the statute does not adequately resolve the current controversy," the meaning that it thereupon assigns to the statute involves the kind of disciplined creativity that is more appropriately classed as "judicial lawmaking." The problem of choosing among a number of plausible alternatives, not calling for an act of discovery, is not one of fact, but of judicial responsibility discharged according to principles peculiar to the law.

R. DICKERSON, *supra* note 83, at 27 (footnotes omitted). The nature of this disciplined creativity in a particular case depends on the court's use of external factors. Dickerson discusses the most common sources of external reference such as legislative intent, *id.* at 66–86, legislative purpose, *id.* at 87–102, legislative history, *id.* at 137–67, and the notion of statutory context, *id.* at 103–24.

93. *See* HART & SACKS, *supra* note 53, at 1262–64.

federal promulgations furnishes some insights into the nature of the Administrator's power. This portion of the history deals with the circumstances under which the Administrator may invoke the enforcement provisions against state governments. The House Committee indicated that the federal authorities should assume responsibility for enforcing federally promulgated implementation plans just as they assumed responsibility for the execution of other anti-pollution plans, such as programs for the reduction of pollution from new stationary sources.[94] This initial commentary, which indicated that federal authorities would replace state governments in the enforcement of both stationary source requirements and implementation plans, is reinforced by the House Committee's protracted commentary relating exclusively to the stationary source requirements.[95] Commenting on the new stationary source requirements alone, the committee stated that federal authorities might promulgate regulations for new stationary sources unless the state decided to adopt such regulations itself.[96] Federal regulations and state adoption of new stationary source requirements were apparently viewed as alternative possibilities; for if federal promulgations would ultimately compel state adoption, deference to the state's earlier decision on whether to adopt the new stationary source requirements would be meaningless. Therefore, compelled adoption seems not to have been contemplated. Nor does the original House draft disclose any intention that federal authorities might compel the state to enforce stationary source requirements. The committee report strongly suggests that a state agency's refusal to enforce stationary source requirements would not amount to a violation of the federal plan.[97] To the extent that these commentaries on the stationary source requirements reflect the attitude toward implementation plans, it would seem that the House Committee did not contemplate the compulsion of state legislative and enforcement measures.

The final version of the amendments, however, did not embrace the House Committee's apparent opposition to compelled state involvement. Although the sections governing new stationary source requirements do

94. The House draft stated that state action to abate air pollution "shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided by [provisions governing implementation plans and new stationary sources]." H.R. REP. No. 1146, 91st Cong., 2d Sess. 24 (1970) (emphasis added).

95. *Cf.* Llewellyn, *supra* note 76, at 402 (Canon of Construction No. 6, similar statutes, and presumably provisions in the same statute having the same objective, are to be read *in pari materia*).

96. H.R. REP. No. 1146, 91st Cong., 2d Sess. 10 (1970).

97. *Id.* The House committee report indicated that upon violation of the stationary source emission standards, federal authorities shall notify state agencies as well as violators. The language in this commentary on the House committee draft, unlike the language in section 1857c-8, clearly distinguished between state agencies and violators, substituting "violators" for the imprecise word "persons." Thus, a state agency's failure to enforce the plan could not constitute a violation.

not require state participation,[98] the implementation plan provision directs the states to draft the initial plan.[99] One commentator has argued that the differences between the provisions with respect to the extent of state involvement suggests that the provisions relating to the promulgation of federal implementation plans, unlike the provisions establishing new stationary source requirements, were intended to impose a duty on the states, rather than present them with a choice.[100]

Both the House and Senate reports referred to the conduct that would violate a federally promulgated plan. For example, the original House draft of the enforcement provisions recommended fines for "any person" who failed to "abate such pollution."[101] In discussing these sanctions, some legislators mentioned only the control of pollution, perhaps implying that the federal promulgations could not penalize a state for its failure to adopt and enforce federal promulgations.[102] One legislator, however, specifically stated that the House bill imposed fines upon states that failed to enact and enforce federal programs against private citizens.[103] The final form of the amendments, though, does not indicate whether direct and indirect

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98. 42 U.S.C. § 1857c-7(d) (1970).

99. *Compare* 42 U.S.C. § 1857c-5 (1970) with 42 U.S.C. § 1857c-6 (1970). *See* notes 8 to 14 and accompanying text *supra.*

100. *See* Luneburg, *supra* note 90, at 667–70. Luneburg suggests that the amendments should be interpreted to allow the states greater flexibility in drafting their implemenation plans than with stationary source requirements. Nevertheless, he contends that only considerations of practicality, rather than lack of statutory authority, preclude the Administrator from requiring that states revise their own approved plans. *Id.* at 637–38, 646 n.46. Under section 1857c-5(a)(2)(H), the plan drafted by a state must provide for revision upon the Administrator's instruction. It is possible to argue that there is little difference between requiring a state to make changes in an approved plan and ultimately requiring the state to establish or adopt federal plans. Luneburg's theory of interpretation cannot be reconciled, however, with the policy of clear statement discussed in notes 113 to 116 and accompanying text *infra.*

101. H.R. REP. No. 1146, 91st Cong., 2d Sess. 28 (1970).

102. One congressman noted that the sanctions applied when any person failed to take action "ordered by the [Administrator] to abate the pollution." 116 CONG. REC. 19209 (1970) (remarks of Congressman Jarman). Similarly another legislator noted that if a state failed to enforce the plan, the Attorney General might bring suit "to secure abatement of polluters" within the state. *Id.* at 19220 (1970) (remarks of Congressman Monagan). Such remarks might imply that federal authorities may force the abatement of pollution indirectly by forcing the states to enforce federal plans. Nevertheless, it is more likely that they reflect the language of the House draft. It seems to contemplate federal enforcement only against the polluters themselves.

103. Congressman Springer specifically stated that:

> If a State hangs back and fails to move out, the Federal Government will take over and make rules and regulations amounting to a State plan. Machinery for forcing a plan upon a State is spelled out including penalties of $10,000 a day for failing to act.

Id. at 19206 (1970).

emission of pollutants constitute the sole violations of an implementation plan.[104] One commentator has argued that this lack of clarity supports the Administrator's position on enforcement, which seeks to classify a state's failure to enforce a federal plan as a violation.[105]

Differences between the statute and the Senate Committee's draft of the promulgation provision also support the view that federal promulgations may demand legislation and enforcement measures from the states. The Senate's version of the promulgation provision provided that: "A plan promulgated by the [Administrator] for any air quality control region shall be . . . applicable . . . *as if such plan had been adopted by the subject State and approved by the [Administrator].*"[106] Use of the phrase "as if" clearly indicates that federally promulgated plans and state legislation were viewed as alternatives. Promulgation of a federal plan would therefore foreclose any recourse to state legislatures. This foreclosure would also negate any asserted federal power to compel state legislation. In contrast, the final version of the promulgation provision states that the Administrator "shall . . . promptly prepare and publish . . . an implementation plan . . . for a State." The use of "for" introduces ambiguities that did not exist in the Senate version. It is possible to read the amended version to allow the Administrator, in promulgating a plan for a state, to either preempt or compel state legislation.[107]

This analysis of the evolution of the text of the statute can be supplemented by consideration of the legislative debates. These debates concerned the allocation of enforcement responsibility between federal and state

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104. *See* Bracken, *Transportation Controls Under the Clean Air Act: A Legal Analysis,* 15 B.C. IND. & COMM. L. REV. 749 (1974). Bracken has argued that the promulgation provision authorized the Administrator to control persons who are "elements in a chain which results in pollution by others," in addition to those actually polluting the atmosphere. *Id.* at 766. Under this interpretation, the amendments would not permit state authorities to acquiesce in pollution by private citizens using state facilities. *Id.* at 764–65. Although the amendments do not expressly authorize such actions against the states, it is troubling that there is no clear statement of the necessary causal connection between pollution and a violation. *Compare* 42 U.S.C. § 1857h–1 (1970) *with* 42 U.S.C. § 1857d(b) (1970) (use of phrase "contributing to such pollution").

105. *See* Bracken, *supra* note 104, at 764–66. Bracken's theory of interpretation cannot, however, be reconciled with the policy of clear statement, which this comment employs to interpret the statute. The policy of clear statement is discussed at note 53 *supra,* and notes 113 to 116 and accompanying text *infra.*

106. S. REP. No. 1196, 91st Cong., 2d Sess. 88 (1970) (emphasis added). The Senate draft was submitted by the Committee on Public Works.

107. An attempt to harmonize the Senate draft with the amendments as enacted might also lead to the conclusion that federal promulgations are tantamount to state legislation. *See* Luneburg, *supra* note 90, at 666–67. Reliance upon this Senate commentary in interpreting the promulgation provision would suggest, however, that this "as if" language should be viewed as permissive rather than mandatory with regard to state officers. *Id.*

authorities. Congressman Staggers, the floor manager of the bill in the House, remarked:

> If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical. Therefore, the Federal Government sets the standards, we tell the States what they must do and what standards they must meet. These standards must be put into effect by the communities and the States, and we expect them to have the men to do the actual enforcing.[108]

Both the Third Circuit and the District of Columbia Circuit interpreted this statement as a prospective endorsement of the Administrator's attempt to compel state enforcement of federal programs.[109] Since it is assumed that Congress intended that air quality standards be attained, the opposition to the creation of federal enforcement machinery implies that Congress expected the states to assume responsibility for the actual administration of the anti-pollution effort.

Although these pieces of legislative history offer some guidance as to congressional intentions, they are ultimately inconclusive. Tenuous inferences must be drawn in order to find significance in the alterations and omissions in the language of the statute.[110] There is no indication that Congress perceived the potential ambiguities of the statute or attempted to resolve them. Although the statements made during the debates do not suffer from this lack of clarity, reliance upon them is equally problematic. Isolated statements made during debates constitute the least reliable category of legislative history and absent supporting material should not be afforded much weight.[111] Viewed in their entirety the legislative materials do not disclose an intent on the part of Congress to depart from the traditional practice of federal enforcement of commerce legislation.[112]

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108. 116 CONG. REC. 19204 (1970).

109. District of Columbia v. Train, 521 F.2d 971, 988 (D.C. Cir. 1975); Pennsylvania v. EPA, 500 F.2d 246, 258 (3d Cir. 1974).

110. For example, the substitution of "for" in place of "as if" in the promulgation provision discloses little about congressional intent. The change is ambiguous; "for" can be interpreted as the equivalent of "as if." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 886 (1971). Thus the change may well have resulted from oversight rather than design. The legislative history does not disclose a clear declaration of congressional intention with regard to federal compulsion of state governments in the event that states refused to cooperate voluntarily.

111. See R. DICKERSON, *supra* note 83, at 156–58.

112. In addition to relying on remarks from the floor debates, both the Third and District of Columbia Circuits cited commentary on the House and Senate committee drafts to support the conclusion that the amendments could be construed to authorize the Administrator to compel state action. The relevant portion of the Senate report stated: "The implementation plan . . . would . . . provide that . . . each region develop motor vehicle inspection and testing programs . . . ." 500 F.2d at 258, 521 F.2d at 987–88, *quoting* S. REP. No. 91-1196, 91st Cong., 2d Sess. 13 (1970). Although

Given the novelty of the EPA's interpretation of the amendments and the absence of conclusive congressional support therefor, the cautious approach of the Fourth and Ninth Circuits is appropriate. The preference for caution in this situation can be explained by a canon of statutory interpretation known as the policy of clear statement. According to this canon, a court will not interpret a statute so as to depart from general principles and policies unless the legislature makes such an intention clear.[113] Federalism is one of those principles that courts hesitate to undermine without a clear statement.[114] For example, in several recent cases involving an attempt to extend federal criminal statutes to cover local activities, the Supreme Court restricted the scope of the legislation.[115] In one of those cases,[116] the Court explained its decision by reference to the policy of clear statement.

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.[117]

This reasoning applies with equal force to the interpretation of the Clean Air Amendments. The autonomy of state legislatures, like local control over law enforcement, plays a crucial role in the federal-state balance. Endorsement of the EPA's interpretation of the amendments would dis-

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congressional committee reports accompanying the draft of a bill are generally considered a more reliable source of interpretive information than the casual and often misleading remarks of legislators on the floor, such commentary cannot be removed from its proper context. *See* HART & SACKS, *supra* note 53, at 1266–67, 1284–86. Even if it is assumed that a federally promulgated plan could compel the state to establish or enforce an auto inspection program, the report does not support a similar inference as to retrofit programs. The Senate report clearly indicates that the Senate draft did not intend to require the inclusion of programs providing for installation of retrofit devices on private vehicles in the initial state implementation plans. S. REP. No. 91-1196, 91st Cong., 2d Sess. 13–14 (1970).

113. HART & SACKS, *supra* note 53, 1240–41, 1412–13.

114. *See* United States v. Bass, 404 U.S. 336, 349 (1971); HART & SACKS, *supra* note 53, at 1240–41. *Cf.* Parden v. Terminal Ry., 377 U.S. 184, 198–200 (1964) (White, J., dissenting).

115. United States v. Enmons, 410 U.S. 396 (1973); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971).

116. United States v. Bass, 404 U.S. 336 (1971).

117. *Id.* at 349. It is significant that the Court adopted this approach despite statements during the debate by Senator Long, the sponsor of the bill, supporting an expansive view of the statute's reach. The Court felt that Long's statements did not supply the requisite degree of clarity since there was no evidence that other members of Congress entertained similar views. *Id.* at 345–47.

place basic state decisions. Because the requisite clear statement is missing, the contentions of the EPA should be rejected.

Although it is therefore possible to resolve the controversy on statutory grounds, the constitutional issues remain important. Two circuits confronted the constitutional issues and their reasoning should be evaluated. Moreover, while this legislation is sufficiently ambiguous to allow courts to avoid the constitutional questions, future legislation could be more explicit. It is therefore desirable to determine whether legislation that adopted the EPA's approach would be constitutional.

III. THE CONSTITUTIONALITY OF THE EPA REGULATIONS

A. *The Commerce Power and State Sovereignty*

If it is determined that the EPA regulations are authorized by the statute, the question arises whether Congress, pursuant to the commerce clause, has the power to compel states to adopt legislation and administer federal programs. The Administrator's position was, in effect, that the commerce power might be exercised to regulate state activity in the same manner it is exercised to regulate private citizens. The states' position, on the other hand, was that their legislative and executive branches could not be made mere appendages of the federal government. Discussion of the limits of the commerce power figured prominently in each of the four circuit court opinions. The Supreme Court's decision in *National League of Cities v. Usery,* however, delivered subsequent to the four appellate decisions, set out a new approach to evaluating the constitutionality of commerce legislation affecting state governments. Because *National League of Cities* altered the prior doctrine in a fundamental manner, the reasoning of the four circuit court decisions is no longer dispositive of the constitutionality of the EPA regulations.[118] This section will examine the constitutional analysis of the four circuits and then evaluate the constitutionality of the EPA regulations in light of *National League of Cities.*

In upholding the regulations directing the institution of a retrofit program, the Third Circuit ruled that the commerce power permitted federal authorities to compel the states to regulate private citizens. Pennsylvania had contended that the regulations exceeded the limits of the commerce power by intruding upon uniquely governmental functions.[119] The court, however, considered the determinative question to be whether

118. For a constitutional analysis of the EPA regulations made prior to *National League of Cities,* see Comment, *Enforcement Provisions, supra* note 3, at 213–22.

119. 500 F.2d at 259. The phrase "uniquely governmental" can be traced to Justice Frankfurter's plurality opinion in New York v. United States, 326 U.S. 572, 582 (1946). *New York* dealt with the power of the federal government to tax New York's mineral water business. Justice Frankfurter sought to identify state activities that should be immune from federal taxation by reference to "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations." *Id.*

the state activities affected commerce and thus refused to rest its decision on a governmental/proprietary distinction.

> [T]he constitutionality of federal regulation of state activities is subject to the same analysis as that of private activities; *viz.* the determinative factor is simply whether they have an impact on interstate commerce.[120]

Because state transportation policies had fostered the pollution by private motorists, the regulations in this case were held to be valid. Thus, federal authorities were allowed to alter Pennsylvania's transportation policies by requiring the state to adopt and administer a retrofit program.

The District of Columbia Circuit reached different conclusions as to the constitutionality of the various regulations ordering state enforcement of EPA programs. Observing that federal legislation was authorized because pollution affected interstate commerce, the court found that Congress might regulate direct or indirect sources of pollution regardless of whether these sources were operated by a state.[121] Thus the regulations requiring the construction of bus lanes and the purchase of additional buses were valid because they sought to control an indirect source of pollution.[122] The state highway and bus systems were the indirect source of pollution in that they influenced other parties to use direct sources of pollution, such as automobiles.[123] Acting under the commerce power, the federal government might order the states to operate their transportation systems in accordance with national standards.

The inspection and retrofit regulations presented a different problem since their primary focus was the conduct of individual motorists; state

120. 500 F.2d at 261.

121. 521 F.2d at 989. The court indicated that it considered these state-owned transportation systems to be analogous to the railroad operated by the state in United States v. California, 297 U.S. 175 (1936). The Court in *California* ordered a state railroad to comply with federal safety standards and install automatic coupling devices. The apparent implication is that the purchase of additional buses is equivalent to the safety regulation at issue in *California* because it merely forces the state to operate its transportation system in a manner that promotes the national health.

122. 521 F.2d at 989. This position resembled the Third Circuit's view that the states could not indirectly encourage or aid pollution by private motorists, but the District of Columbia Circuit adopted a more limited concept of indirect sources. Whereas the Third Circuit supported federal regulation of "transportation systems," a generic term describing the whole collection of *state policies* that facilitated pollution by private motorists, the District of Columbia Circuit identified only existing state operations, such as roads, as indirect sources of pollution. Despite these differences in the definition of indirect sources, both circuits indicated that the acquiescence of the states to pollution by private motorists, as well as the pollutants emitted from state owned vehicles, could justify federal regulation of state activity.

123. The court noted, however, that state and local governments were not wholly responsible for the perpetuation of policies that favored the automobile. The massive appropriations of the federal highway program also had a significant effect. 521 F.2d at 990 n.25.

action had not contributed to the problem. Turning first to the provision that prohibited the registration of noncomplying vehicles, the court ruled it valid because it was merely a safety regulation designed to facilitate commerce.[124] Moreover, the provision did not force the states to undertake affirmative action; simply denying registration would be sufficient. But the court struck down the provisions that required the state to establish and enforce inspection and retrofit programs. The Administrator's attempt to control the regulatory powers of the states, along with their personnel and resources, was considered an unconstitutional intrusion upon state sovereignty.[125]

While the Ninth and Fourth Circuits rested their decisions on statutory grounds,[126] the constitutional implications of the Administrator's position induced both circuits to discuss the issue of relations between the federal and state governments. The courts emphasized that the EPA approach would grant the federal government free access to state treasuries and unbridled authority to control state officers.[127] Both courts also expressed a preference for the traditional technique of securing state cooperation through threat and promise because this approach seemed more compatible with principles of federalism.[128]

The differences between the four circuit court decisions are indicative of the difficulties involved in defining the limits of the commerce power as applied to the states. The Third Circuit reasoned that because the policies of state governments permitted private citizens to operate their motor vehicles in a manner that generated harmful levels of air pollution, the states might be compelled to alleviate air pollution by regulating private citizens. Although the Fourth and Ninth Circuits did not rely on constitutional grounds, they implied that a distinction should be made between the regulation of proprietary state operations and control over purely governmental institutions, such as legislatures and executives. The District of Columbia Circuit, although invalidating inspection and retrofit regulations that sought to compel the states to exercise their regulatory powers, upheld regulation of state activity that constituted an indirect source of pollution.

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124. *Id.* at 991–92.

125. The court noted:

> [W]here cooperation is not forthcoming, we believe that the recourse contemplated by the commerce clause is direct federal regulation of the offending activity and not coerced state policing of the details of an intricate federal plan under threat of federal enforcement proceedings.

Id. at 993.

126. In resting the decision on statutory grounds, the courts followed the doctrine of Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), which holds that constitutional issues should be avoided if alternative grounds of decision are available.

127. 530 F.2d 215, 227 (4th Cir. 1975); 521 F.2d 827, 839 (9th Cir. 1975).

128. 530 F.2d 215, 228 (4th Cir. 1975); 521 F.2d 827, 840 (9th Cir. 1975).

B. National League of Cities v. Usery

In *National League of Cities* the Supreme Court, speaking through Justice Rehnquist, reformulated its view of the limits of the commerce power. A majority of five justices overturned the 1974 amendments to the Fair Labor Standards Act that extended minimum wage standards to practically all state employees. Further, the Court overruled its prior decision in *Maryland v. Wirtz*,[129] which had upheld the application of minimum wage standards to employees in state schools and hospitals. While acknowledging that the commerce clause granted broad power to Congress, the Court ruled that this power might not be exercised so as to vitiate state sovereignty.

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.[130]

Thus state sovereignty was seen as a limit on the authority conferred by the commerce clause.

In explaining the boundaries of the commerce clause, the Court in *National League of Cities* emphasized the nature of the state interest affected by the legislation. Two elements were considered significant. First, the affected state activity was a traditional function of state government. Second, the federal legislation intruded upon policies that related to integral operations of this traditional function.

> [T]he Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require . . . . But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment.[131]

Justice Rehnquist did not attempt to precisely define either "traditional governmental functions" or "integral operations." In describing the former,

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129. 392 U.S. 183 (1968). The Court in *Wirtz* had expressly considered whether the commerce power might be limited by notions of state sovereignty. It concluded that such a limitation did not exist. The Court observed:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaged in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.

Id .at 196–97. This language could be read as an adoption of a governmental/proprietary distinction since the schools and hospitals affected by the regulations were originally proprietary. But the Court disavowed such a distinction in the *Wirtz* opinion itself, *id.* at 195, and again in Fry v. United States, 421 U.S. 542 (1975), where it upheld a federal wage freeze affecting all state employees.

130. 96 S. Ct. at 2474.

131. 96 S. Ct. at 2472.

he merely referred to activities that are "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services."[132] On the latter point, he simply declared that the power to determine wages was an "undoubted attribute of state sovereignty."[133] Under this two-pronged analysis, the constitutionality of federal commerce legislation would be determined solely by reference to its impact on state operations. If the federal legislation supplants essential state decisions regarding the conduct of traditional governmental functions, the statute is unconstitutional.[134]

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132. 96 S. Ct. at 2474 & n.16. Although the Court failed to articulate precise criteria for the identification of a traditional governmental function, it appears to have given state activities a broader exemption from federal commerce regulations than the exemption permitted by the governmental/proprietary standard employed in federal tax clause cases. Had the Court defined traditional state functions in terms of a governmental/proprietary dichotomy, it would have upheld federal regulation of state activities with counterparts in the private sector, such as the state schools and hospitals involved in *Wirtz*. *See* Comment, *Implied Waiver of a State's Eleventh Amendment Immunity,* 1974 DUKE L.J. 925, 936. The Court's decision to define the limits of the commerce power in terms of the character of the state activity directly regulated thus constituted a distinct departure from commerce clause precedent.

133. 96 S. Ct. at 2471. Justice Rehnquist did not elaborate on the precise relation between the determination of wages and state sovereignty. Justice Brennan emphasized this omission in his dissent. *Id.* at 2484–85 (Brennan, J., dissenting).

134. In adopting positions that favored the states, the Ninth and the Fourth Circuits lacked the benefit of the Supreme Court's new approach to commerce legislation announced in *National League of Cities*. They had to reconcile their decision with *Wirtz*. The Ninth Circuit attempted to distinguish between the EPA regulations, which sought to control state governance of commerce and the statute in *Wirtz,* which sought to regulate state economic activities. 521 F.2d at 838–39 (dictum). The Fourth Circuit indicated that it would exempt from federal regulation those activities uniquely attributable to state government, such as state legislatures. 530 F.2d at 225–26 (dictum). Both circuits focused on the limiting language in *Wirtz,* which can be read as restricting the scope of federal commerce regulation to proprietary state activities. *See* Comment, *Enforcement Provisions, supra* note 3, at 189, 218–19; note 66 and accompanying text *supra*. Further, both circuits would have declared the federal regulations unconstitutional in their entirety. They would have invalidated not only those regulations that demanded state legislation, but also those that required state officers to deny registration to nonconforming vehicles or identify bus lanes on existing state highways. Yet these latter regulations are preemptive in character, seeking only minimal cooperation from state authorities. The focus of both circuits on the inadvertent regulation of state legislatures or executives raises the insoluble problem of deciding whether commerce regulations are concerned solely with state roadways affecting commerce or whether they ultimately seek to control those state governments whose decisions direct such activities.

The Court in *National League of Cities* recognized the federal interest in regulating state activities that directly affect commerce yet limited the exercise of federal power when it significantly impeded state decision-making processes. The majority conceded the federal interest in minimum wage legislation and readily acknowledged the state's assumption of a proprietary role in the employment market. 96 S. Ct. at 2472. It did not, however, consider these facts to be dispositive.

The Court's discussion of *Fry v. United States*,[135] however, suggested that impact on state government may not be the exclusive consideration in determining constitutionality. In *Fry* the Court upheld the Economic Stabilization Act of 1970, which imposed a temporary freeze on the wages of state and local government employees. Justice Rehnquist distinguished the *Fry* legislation from the legislation at issue in *National League of Cities* on two grounds. First, he stated that the wage freeze did not displace essential state decisions but merely prolonged the use of the existing wage scales and reduced pressures on state budgets. Second, he observed that the wage freeze legislation was a response to a national emergency that threatened the well-being of the entire country.[136] The first of these distinctions, although reconciling *National League of Cities* with *Fry*, involves some questionable reasoning. A freeze on wages clearly displaces state decisions concerning the wages of its employees and precludes independent state evaluation of the worth of a worker's services.[137] The

135. 421 U.S. 542 (1975).

136. 96 S. Ct. at 2474–75. Justice Marshall's majority opinion in *Fry*, however, did not give much weight to these two factors. He observed that opposition to commerce legislation grounded on considerations of state sovereignty had been foreclosed by the decision in *Wirtz*. Fry v. United States, 421 U.S. 542, 548 (1975). Severe economic dislocation may result from either minimum wage standards or wage controls. One commentator has argued that although less affluent states might suffer initially from the imposition of minimum wage standards, the imposition of such standards might relax the economic barriers to interstate travel. He suggests that the benefits of such wage increases might eventually register in the poorer states through a simultaneous expansion of both their labor force and their tax base. *See* McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. REV. 485, 496 n.69 (1973).

By contrast, wage controls would allow wealthier states to absorb surplus pools of labor and increase public services. But it is less certain that wage controls would have a similar effect in those states paying their employees at rates less than the established ceiling. Wage controls might prevent an increase in public services in those states that need them most by preventing those states from offering higher wages and attracting more workers.

137. In his dissent Justice Brennan characterized as mere sophistry the argument that the Economic Stabilization Act did not displace state choices. He considered it "absurd to suggest that there is a constitutionally significant distinction between curbs against increasing wages and curbs against paying wages lower than the federal minimum." 96 S. Ct. at 2484. Indeed, Justice Brennan's position on this point parallels the views expressed by Justice Rehnquist in his *Fry* dissent advocating the invalidation of the Economic Stabilization Act. Insisting that the principle of state government immunity against certain nondiscriminatory federal taxes should apply equally to commerce legislation, Justice Rehnquist noted: "But where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer." 421 U.S. at 554 (Rehnquist, J., dissenting). That Justice Rehnquist in *Fry* apparently considered the Economic Stabilization Act so intrusive as to be unconstitutional undercuts his suggestion in *National League of Cities* that the Act "displaced no state choices as to how governmental operations should be structured." 96 S. Ct. at 2475.

second distinction does not suffer from defects in reasoning but it departs from the proposed analysis, which concentrates exclusively on the impact on the state, by suggesting that a compelling federal interest may justify displacement of state decisions.[138] Reliance on the emergency doctrine suggests that the determination of constitutionality may rest on a balancing of federal and state interests; if the federal legislation were to reflect a strong national interest, some interference with the operation of state governments might be permissible.

C. National League of Cities *and the Clean Air Amendments of 1970*

Application of *National League of Cities* to the Clean Air Amendments and other legislation entails a consideration of two possible tests. The first test follows Justice Rehnquist's analysis by examining whether the federal legislation displaces essential state decisions regarding the conduct of traditional governmental functions. The second test applies the balancing analysis suggested by the Court's distinction of *Fry* by considering whether the federal interest is substantial enough to justify an intrusion into the decision-making process of state governments.

Justice Rehnquist's analysis, which focused on the degree of intrusion into certain types of state operations, is difficult to apply because it relies on vague characterizations such as "essential decisions" and "traditional governmental functions." Moreover, no criteria are provided for identifying traditional functions other than that the activity should relate to the "dual functions of administering the public law and furnishing public services."[139] Although this statement expresses a rather expansive view

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138. In distinguishing *Fry* Justice Rehnquist emphasized the economic emergency that had inspired the Economic Stabilization Act. "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." 96 S. Ct. at 2475, *quoting* Wilson v. New, 243 U.S. 332, 348 (1917). Furthermore, he distinguished Case v. Bowles, 327 U.S. 92 (1946), which upheld as a proper exercise of the war power the application of the Emergency Price Control Act to a sale of timber by the state of Washington. 96 S. Ct. at 2475 n.18. The existence of a national emergency is implicit in the operation of the war power; otherwise, there would be no basis for treating the war power differently than the commerce power with respect to the preservation of state sovereignty.

139. 96 S. Ct. at 2474. It should be noted, however, that the notion of traditional governmental functions is not entirely novel. A similar standard has been employed in the tax cases to delineate the scope of state immunity against nondiscriminatory federal taxes. New York v. United States, 326 U.S. 572, 587 (Stone, C.J., concurring). Once it is determined that there should be a limit on the commerce power based on state sovereignty, the problem becomes one of formulating a test to describe the limit. Justice Rehnquist expressed his awareness of this problem in his *Fry* dissent, which closely parallels the language and reasoning of his majority opinion in *National League of Cities*.

It is conceivable that the traditional distinction between "governmental" and "proprietary" activities might in some form prove useful in such line drawing. The

of traditional functions, the Court specified that the classification does not include state-owned railroads.[140] *United States v. California,*[141] which dealt with the application of federal safety regulations to a state railroad, was expressly distinguished on the ground that the railroad was not an integral part of the state's governmental activities.[142] The Court's treatment of *California* suggests that the determinative characteristic of a traditional governmental function is that it provides public services. *National League of Cities* is distinguishable from *California* in that the state activities affected by the minimum wage law were directed toward providing public services whereas the railroad in *California* was not operated to benefit the general public.[143] Thus, analysis of the EPA regulations must begin with an examination of the nature of the state activities affected.

The various EPA regulations at issue in the four cases seek to control state transportation policies in the areas of highway construction, mass transit planning, and motor vehicle administration. They command the construction of express bus lanes and bikeways,[144] the purchase of addi-

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distinction suggested in New York v. United States . . . between activities traditionally undertaken by the State and other activities, might also be of service . . . . Fry v. United States, 421 U.S. 542, 558 n.2 (1975) (Rehnquist, J., dissenting). The Court in *National League of Cities* avoided reliance on a governmental/proprietary distinction because that dichotomy did not protect proprietary operations, like hospitals, which clearly deliver vital public services.

140. 96 S. Ct. at 2475 n.18.

141. 297 U.S. 175 (1936).

142. 96 S. Ct. at 2475 n.18. *California* upheld the enforcement of federal safety regulations against a state owned railroad. While acknowledging that the federal taxing power could not be exercised against traditional state activities, the *California* Court denied the existence of any similar limitation on the commerce power. Chief Justice Stone observed: "But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 185. This language clearly contravenes the principle of state sovereignty espoused by *National League of Cities.* Recognizing the conflict, Justice Rehnquist declared that Chief Justice Stone's statement, which he labeled dicta, was simply wrong. 96 S. Ct. at 2475.

143. The railroad that was the object of regulation in *California* operated at the San Francisco harbor. It serviced forty-five state-owned wharves and numerous industrial plants. There were several connections with interstate lines and the bulk of the traffic had its origin or destination outside California. 297 U.S. at 181. The Court concluded that "[i]ts service is of a public character, for hire, and does not differ in any salient feature from that which this Court . . . held to be common carriage by rail in interstate commerce within the meaning of the federal Hours of Service Act." *Id.* at 182.

Thus, the railroad operation was not designed to furnish public services, but was instead intended to guarantee state control over rail operations in the harbor area. The railroad could not be considered a traditional governmental function. Justice Rehnquist distinguished two other cases upholding federal regulation of state railroads on this basis. Parden v. Terminal Ry., 377 U.S. 184 (1964); California v. Taylor, 353 U.S. 553 (1957).

144. *See* note 38 *supra.*

tional buses,[145] the institution of inspection and retrofit programs,[146] and the denial of registration to those vehicles that fail to comply with federal programs.[147] On the basis of the proposed reading of *National League of Cities,* these operations would seem to qualify as traditional governmental functions because they deliver public services through the provision of highways, public transportation and vehicle registration. Once it is assumed that the regulations affect traditional governmental operations, the relevant inquiry becomes whether they displace essential state policies relating to those operations. That inquiry involves an examination of each regulation.

The regulations that demand the construction of exclusive bus lanes and the purchase of additional buses were upheld by the District of Columbia Circuit. Because they displace state decisions about how to structure the delivery of these services, however, the analysis in *National League of Cities* would appear to refute their validity.[148] Acceptance of these regulations would allow EPA officials to control state plans and funds for highway construction and public transportation.[149] Such a result would

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145. *See* notes 37 & 40 *supra.*

146. *See* note 33 *supra.*

147. *See* note 35 *supra.*

148. Although the express lane and bus purchase regulations might conceivably increase the delivery of mass transit services to the public, the beneficial impact of the federal regulations does not affect the assessment of their constitutionality. The Court in *National League of Cities* observed that "particularized assessments of actual impact" were not "crucial to resolution of the issue." 96 S. Ct. at 2474.

National League of Cities did not indicate whether regulations that indirectly foreclose state policy choices could withstand constitutional scrutiny. While Congress has seldom ordered the states to act in a particular fashion, federal commerce legislation has often influenced state activities by foreclosing certain courses of action. *See* Hart, *supra* note 1, at 515–16. The question arises whether the EPA Administrator could issue regulations that required future state highway construction to comply with federal designs or that specified the purchase of only certain approved types of buses. It is not clear whether such regulations would be considered to displace state choices or whether the choices displaced would be deemed "essential." Although *National League of Cities* did not address a statute of this variety, it did distinguish *Fry,* which involved a negative command against exceeding wage ceilings, partly on the ground that state choices were not displaced. The mere fact that a statute operates through negative commands should not be dispositive of whether state choices are displaced. Foreclosure of action may affect the selection of state policies to the same extent as direct orders. *See* note 136 *supra.* The issue of negative commands will be presented to the Court in the EPA cases by the regulations that order states to deny registration to private motorists who fail to comply with federal standards.

149. The constitutionality of regulations in the California Transportation Control Plan that merely required the identification of express lanes is less clear. *See* note 40 *supra.* Since these regulations do not involve the expenditure of state construction funds, it is possible to argue that they do not displace "essential" decisions. Nevertheless, to the extent that the regulations restructure local traffic patterns, they exert a

conflict with the principles of state autonomy enunciated in *National League of Cities.*

The regulations requiring the institution of inspection and retrofit programs present a different problem. They do not seek to control the policies of existing state agencies, but instead direct the legislative and executive branches of state governments to establish new policies and programs. Given the concern for state sovereignty expressed in *National League of Cities,* the substantial intrusion into state affairs by these regulations makes them suspect. The formulation and enactment of legislation is certainly a traditional state function and choice of policies and programs forms an essential part of the legislative process.[150] Because these regulations attempt to usurp the legislative function of state governments by demanding specific programs and dictating the actual terms of the statutes, they cannot be reconciled with the *National League of Cities* standard for

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significant impact on local policies. The constitutionality of these regulations is therefore problematic.

150. *See* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 604–05 (C. Tansill ed. 1927). The Pickney proposal, advanced at the Federal Constitutional Convention, would have allowed a federal repeal of state legislation, or, in the alternative, a federal veto power over the legislation proposed for a state. The proposition failed. The delegates feared an omnipresent national legislature with the authority to scrutinize the decisions of state governments. The delegates preferred preemption as an effective check on state legislatures.

The Voting Rights Act of 1965 represented an effort to regulate the policy choices of state governments. One of its provisions required certain states to submit proposals for changes in their electoral legislation to either the Attorney General or the District of Columbia Court of Appeals. 42 U.S.C. § 1973c (Supp. I 1965), *as amended,* 42 U.S.C. § 1973c (Supp. V 1975). The Court upheld the act, emphasizing that state electoral machinery had been used to implement a policy of discrimination against black voters. South Carolina v. Katzenbach, 383 U.S. 301 (1966). Justice Black dissented, characterizing the procedure as a federal veto power over state legislation. *Id.* at 358–59 (Black, J., dissenting in part and concurring in part). But in equating the 1965 act with the installation of a federal veto power over state legislatures, Justice Black mistook the rehabilitation of state electoral institutions for the replacement of state legislatures. Since the command of the fifteenth amendment directly addresses the states, federal regulation of state election machinery was proper.

Advocates of a broad interpretation of the fourteenth and fifteenth amendments have been careful to defend the substantial intrusions into state electoral processes by reference to the constitutional interest in eliminating state discrimination against eligible voters. They have emphasized that federal regulations have not attempted to exercise complete control over a state's electoral institutions through compelled enfranchisement of certain groups within the populace. *See* Oregon v. Mitchell, 400 U.S. 112, 240 (1970) (Brennan, J., dissenting in part and concurring in part).

The First Circuit, in a decision rendered prior to the direct federal-state confrontation in Pennsylvania v. EPA, recognized that constitutional grants of congressional power vest authority over certain spheres of activity, not over state institutions. Although it interpreted the Clean Air Amendments to grant the Administrator wide discretionary power over the control of pollution, the court ruled that the Administrator did not have the power to repeal state laws. Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875, 887–88 (1st Cir. 1973).

constitutionality.[151] The regulations that command the denial of registration to noncomplying vehicles, however, should pass constitutional muster. Although the process of registering vehicles probably qualifies as a traditional governmental function, the imposition of an additional registration requirement hardly displaces essential state policies. The state has no valid interest in registering vehicles that do not comply with federal inspection standards.[152]

The EPA regulations, by seeking to displace policy decisions regarding the construction of roadways, the purchase of buses, and the enactment of legislation substantially intrude into the operation of state governments. This interference cannot be reconciled with Justice Rehnquist's assertion, in *National League of Cities,* that Congress could not supplant state choices "as to how essential decisions regarding the conduct of integral governmental functions are to be made."[153] The only regulations that can withstand Justice Rehnquist's proposed analysis are those that direct the denial of registration. The others constitute an unconstitutional burden on traditional state operations.

National League of Cities indicated that some federal interference with state operations might be permissible in the event of a national emergency, and it distinguished *Fry* on that basis. Thus, if the federal legislation represented a response to a serious national problem, a court might balance the federal interest against the state's interest in preserving

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151. This aspect of the EPA regulations clearly disrupts the regulatory relationship between states and private motorists. The Court has checked similar extensions of federal authority in analogous areas. *Compare* Ashton v. Cameron County Water Improvement Dist. No. One, 298 U.S. 513 (1936) (federal legislation that permits political subdivisions to readjust their debts in federal bankruptcy courts without the approval of state governments held an unconstitutional extension of the bankruptcy power) *with* United States v. Bekins, 304 U.S. 27 (1938) (sustaining revised federal legislation that required state approval). Both *Ashton* and *Bekins* might be read for the general proposition that federal legislation can neither subvert the regulatory relationship between states and their subordinates nor subject state resources to federal regulation. *Ashton* dismissed an argument based on the commerce power that attempted to justify this federal intrusion. 298 U.S. at 531–32. It observed that the commerce power did not extend to commercial transactions that did not exert a substantial effect on commerce. Since *Ashton,* the Court has significantly expanded the concept of a substantial impact on interstate commerce, reaching even local businesses. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111, 127–28 (1942). This does not mean that, with the modified scope of the substantial-insubstantial distinction, the *Ashton* Court would have concluded that the commerce power justified the legislation. Prior to *Ashton,* one commentator expressed the concern that the Court's holding in *California* would relegate states to the status of persons and completely extinguish the state's claims for control over their own fiscal affairs. He urged that concerns for state autonomy should suffice to invalidate federal legislation that was unduly intrusive. *See* Note, *State Sovereignty as a Limitation Upon the Commerce Power,* 45 YALE L.J. 1118, 1120–21 (1936).

152. For a discussion of the constitutionality of this regulation under the *National League of Cities* analysis see note 148 *supra.*

153. 96 S. Ct. at 2475.

its autonomy. Because the air pollution crisis arguably constitutes a national emergency these considerations might be relevant to an evaluation of the EPA regulations.[154] Assuming that air pollution, like inflation, can be considered a national emergency, the issue becomes whether the contribution of the EPA regulations to the alleviation of pollution outweighs the interest in preventing the erosion of state sovereignty.

Even under this balancing analysis, it is doubtful that the regulations requiring the purchase of additional buses and the construction of express bus lanes are constitutional. To the extent that these measures promote the more efficient use of transportation facilities, they advance the national interest in reducing air pollution. Nevertheless, their intrusion into state operations is severe; the regulations would supplant basic state decisions regarding the formulation of a budget and the selection of construction projects.[155] Moreover, the federal government can accomplish these objectives through the less intrusive means of financing the projects directly. In this respect, these regulations are distinguishable from the measures upheld in *Fry* where the extension of the wage freeze to state employees constituted an essential component of the attack on inflation. Furthermore, the *Fry* legislation was temporary and, rather than requiring affirmative action from the states, it merely proscribed any alteration in their wage structure. Thus, on balance, the federal interests advanced by these regulations do not support the usurpation of such fundamental decisions.

The regulations that direct the adoption and enforcement of inspection and retrofit programs likewise fail to withstand the scrutiny of the balancing analysis. To the extent that these regulations seek to orchestrate state legislation and control the regulatory power of the executive branch,

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154. Justice Blackmun apparently read the majority opinion to preserve a balancing approach; for he expressly conditioned his participation in the opinion upon that reading of the case.

> I may misinterpret the Court's opinion, but it seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.

96 S. Ct. at 2476. Given the five to four split on the decision, Justice Blackmun's advocacy of balancing may be a significant factor in future litigation.

In a recent case involving the application of Title VII age discrimination requirements to state governments, a federal district court interpreted *National League of Cities* to support a balancing analysis. *See* Usery v. Board of Educ., 421 F. Supp. 718 (D. Utah 1976). Because the federal interest in nondiscriminatory hiring practices outweighed any state interest in making age a criterion of employment, the legislation was sustained. Furthermore, the legislation could be justified as a proper exercise of the enforcement clause of the fourteenth amendment, which expressly operates against the states. *See also* Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976).

155. The substance of these regulations is discussed in notes 33 & 34 and accompaning text *supra*. The regulations that merely require the identification of express lanes, note 149 *supra*, place less strain on state budgets. They might survive the balancing analysis because they are less intrusive.

they mark a startling intrusion into the operation of state governments. Interference with the essence of state sovereignty will not be tolerated unless it is necessitated by a compelling federal interest. The inspection and retrofit regulations do not reflect this requisite urgency; the entire program could be accomplished through direct federal action or through the simple expedient of requiring states to deny licenses to noncomplying motorists. Given the availability of less objectionable means to accomplish the same federal purposes and the importance of the affected state functions, the balance should be struck in favor of the preservation of state independence.

Thus, the EPA regulations at issue in the four circuit court cases cannot be reconciled with the Supreme Court's renewed concern for federalism and state sovereignty.[156] Regardless of which interpretation of *National League of Cities* is applied, the regulations cannot withstand constitutional scrutiny. The only exception to this general condemnation is the regulation ordering the states to deny registration to vehicles that fail to comply with federal emissions standards; unlike the other contested regulations, this measure operates as a prohibition rather than a demand for affirmative action.

IV. CONCLUSION

When the Supreme Court considers the varied results reached by the Ninth, Fourth and District of Columbia Circuits, it will confront difficult statutory and constitutional issues. In seeking to compel legislative and enforcement measures from the states, the EPA regulations provide the basis for an extraordinary extension of federal control over state governments. Occasional references in the statutory history of the Clean Air Amendments lend some support to the claim that the states might be compelled to establish or adopt and enforce federal programs. But an examination of the amendments themselves warrants the conclusion that Congress did not consider this issue. Neither the promulgation nor the enforcement provisions authorize the Administrator to compel the states to construct roadways or purchase transit buses. Nor do they contemplate compelling the states to regulate private motorists. Consistent with

156. Although *National League of Cities* appears to be dispositive of the contested EPA regulations, that decision leaves some questions unresolved. If Justice Rehnquist's analysis prevails, the focus of future litigation will be on the identification of "essential policy choices" and "traditional governmental functions." The Court appears to have adopted an expansive view of traditional governmental functions, but it has not delineated the extent to which state governments are to be shielded from federal interference. There are gray areas that remain to be resolved on a case by case basis, a fact that Justice Rehnquist recognized in his *Fry* dissent. 421 U.S. at 558 & n.2 (Rehnquist, J., dissenting). For a general discussion of *National League of Cities* and its implications for the allocation of power between federal and state governments see Note, *Municipal Bankruptcy, the Tenth Amendment, and the New Federalism*, 89 HARV. L. REV. 1871, 1878–91 (1976).

the policy of clear statement, the absence of specific statutory language authorizing the Administrator to compel action by state governments should allow the Court to avoid the constitutional issues.

If the Court addresses the constitutional issues raised by the EPA regulations, its deliberations should be guided by the principles of state sovereignty enunciated in *National League of Cities.* Considerations of these issues would provide the Court an opportunity to clarify whether *National League of Cities* preserves a balancing analysis for evaluating the constitutionality of federal commerce legislation or endorses the traditional governmental function approach articulated by Justice Rehnquist. Under either of the possible readings of *National League of Cities,* however, the EPA regulations, with a few exceptions, should be declared unconstitutional.